

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

THOMAS JACOB FRANKLIN,  
 #93896

Plaintiff,

vs.

STATE OF NEVADA,

Defendant.

2:10-cv-01986-RLH-RJJ

**ORDER**

On November 15, 2010, plaintiff submitted a handwritten document titled “petition for writ for complaint of lawsuit (1983) action” (docket #1). The document is not on the court’s form and, as such, is insufficient to initiate a civil rights action in this court. The Local Rules require plaintiffs appearing in *pro se*, such as this plaintiff, to file all of their complaints and petitions on the court’s approved forms. LSR 2-1(“[a] civil rights complaint filed by a person who is not represented by counsel shall be on the form provided by this court.”). Moreover, plaintiff has failed to either pay the filing fee or submit an application to proceed *in forma pauperis* on the required form. *See* 28 U.S.C. § 1915(a)(1)-(2); Local Rules of Special Proceedings 1-1, 1-2. As set forth below, even in the absence of an application to proceed *in forma pauperis*, the court must dismiss the complaint for failure to state a claim

1 for which relief may be granted.

2 **I. Screening Standard**

3 Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a  
4 prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious,"  
5 "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who  
6 is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an  
7 arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may,  
8 therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or  
9 where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a  
10 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*  
11 *v. Arizona*, 885 F.2d 639, 640 (9<sup>th</sup> Cir. 1989).

12 Allegations in a *pro se* complaint are held to less stringent standards than formal  
13 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S.  
14 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9<sup>th</sup>  
15 Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the  
16 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal  
17 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of  
18 infringement of a legal interest that clearly does not exist), as well as claims based on fanciful factual  
19 allegations (*e.g.* fantastic or delusional scenarios). *See Nietzke*, 490 U.S. at 327-28; *see also McKeever*  
20 *v. Block*, 932 F.2d 795, 798 (9<sup>th</sup> Cir. 1991). Moreover, "a finding of factual frivolousness is appropriate  
21 when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are  
22 judicially noticeable facts available to contradict them." *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).  
23 When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the  
24 complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint  
25 that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106  
26 (9<sup>th</sup> Cir. 1995).

## 1 II. Instant Complaint

2 Plaintiff, who apparently is incarcerated at Northern Nevada Correctional Center, has  
 3 named the State of Nevada as the sole defendant. First, states and any governmental agency that is an  
 4 arm of the state are not persons for purposes of § 1983. *See Arizonans for Official English v. Arizona*,  
 5 520 U.S. 43, 69 (1997); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Doe v. Lawrence*  
 6 *Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9<sup>th</sup> Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1398-99 (9<sup>th</sup>  
 7 Cir. 1993) (en banc); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9<sup>th</sup> Cir. 1991); *Howlett*  
 8 *v. Rose*, 496 U.S. 356, 365 (1990); *Flint v. Dennison*, 488 F.3d 816, 824-25 (9<sup>th</sup> Cir. 2007). Section  
 9 1983 claims against states or a governmental entity that is an arm of the state, therefore, are legally  
 10 frivolous. *See Jackson v. Arizona*, 885 F.2d 639, 641 (9<sup>th</sup> Cir. 1989), superseded by statute on other  
 11 grounds as stated in *Lopez v. Smith*, 203 F.3d 1122, 1130 (9<sup>th</sup> Cir. 2000) (*en banc*).

12 Second, to the extent that the complaint is decipherable, it appears to be simply a  
 13 recitation of boilerplate legal standards, with almost no factual allegations. Plaintiff may be challenging  
 14 whether his sentences are to run concurrently or consecutively. However, when a prisoner challenges  
 15 the legality or duration of his custody, or raises a constitutional challenge which could entitle him to an  
 16 earlier release, his sole federal remedy is a writ of *habeas corpus*. *Preiser v. Rodriguez*, 411 U.S. 475  
 17 (1973); *Young v. Kenny*, 907 F.2d 874 (9<sup>th</sup> Cir. 1990), *cert. denied* 11 S.Ct. 1090 (1991). Moreover,  
 18 when seeking damages for an allegedly unconstitutional conviction or imprisonment, “a § 1983 plaintiff  
 19 must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive  
 20 order, declared invalid by a state tribunal authorized to make such determination, or called into question  
 21 by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.” *Heck v. Humphrey*, 512 U.S.  
 22 477, 487-88 (1994). “A claim for damages bearing that relationship to a conviction or sentence that has  
 23 not been so invalidated is not cognizable under § 1983.” *Id.* at 488.

24 Accordingly, this action is dismissed without prejudice. If plaintiff chooses to file a  
 25 *habeas corpus* petition, he may do so in a new action, with a new case number, on the court-approved  
 26 forms, accompanied by either an application to proceed *in forma pauperis* or the filing fee.

1 **III. Conclusion**

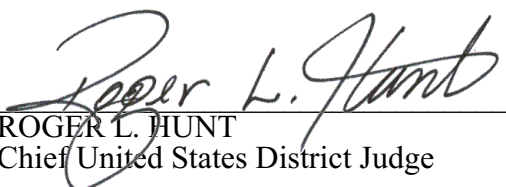
2 **IT IS THEREFORE ORDERED** that the Clerk shall **FILE** the complaint (docket #1).

3 **IT IS FURTHER ORDERED** that plaintiff's complaint is **DISMISSED** without  
4 prejudice.

5 **IT IS FURTHER ORDERED** that the Clerk shall send to plaintiff a blank petition for  
6 writ of *habeas corpus* form with instructions, as well as the approved form for an Application to Proceed  
7 *In Forma Pauperis* by a prisoner, as well as the document "Information and Instructions for Filing a  
8 Motion to Proceed *In Forma Pauperis*."

9 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly and close  
10 this case.

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13 DATED this 21<sup>st</sup> day of December, 2010.

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16 **ROGER L. HUNT**  
17 Chief United States District Judge  
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